Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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CASE NO. 87-154

IN THE UNITED STATES SUPREME COURT

OCTOBER, 1987 TERM

JOSHUA DESHANEY, a Minor, by his Guardian ad Litem, and MELODY DESHANEY,

Petitioners (Plaintiffs)

v.

WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES, WINNEBAGO COUNTY, ANN KEMMETER and CHERYL STELSE,

Respondents (Defendants).

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioners set forth three questions in their Petition for Writ of Certiorari. All three in effect address the same identical issue: Whether respondents' conduct was so egreious as to trigger the protection of the due process clause. The flaw in petitioners' presentation is that it overlooks the fact that the Seventh Circuit Court of Appeals made this assumption in their decision.

> We may assume that the failure of the Winnebago Department of Social Services to protect Joshua from his father was a sufficiently aggravated form of negligence to escape the bar of Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662, 665, 667, 88 L.Ed.2d 662 (1986) and Davidson v. Cannon, 464 U.S. 344, 106 S.Ct. 668, 670, 88 L.Ed.2d 677 (1986), which hold that simple negligence does not violate Section 1983.

DeShaney v. Winnebago County Dept. of Social Services, 812 F.2d 298, 302 (7th Cir. 1987).

It is respectfully suggested that the issues

as framed herein by respondents encompass the grounds for the Seventh Circuit's dismissal and as such represent the only true issues properly before this Court.

1. Whether the Fourteenth Amendment's concept of liberty affords individuals the right to basic protective services?

2. Whether a "special relationship" arose between the Department of Social Services and Joshua DeShaney thereby creating a constitutional duty on behalf of the Department to protect Joshua from abuse by a third party.

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STATEMENT OF THE CASE

Since the statement set forth by the petitioners is replete with inaccurate and inflamatory argument asserted to gain the sympathy of the Court, respondents find it necessary to resort to Supreme Court Rule 34(.2) and in turn set forth certain facts which were omitted or inaccurately stated by petitioners.

In 1979 the principal petitioner, Joshua DeShaney, was born in Wyoming, the son of Melody and Randy DeShaney. In 1980 a Wyoming Court granted the DeShaneys a divorce awarding custody of Joshua to his father. Shortly thereafter, Randy DeShaney moved with Joshua to Wisconsin. Randy DeShaney remarried a woman by the name of Christine.

Respondent, Ann Kemmeter, a social worker serving the DeShaney family, first came in contact with Joshua DeShaney on January 22, 1983. Joshua

was brought to the Theda Clark Regional Medical Center in Neenah, Wisconsin and examined by Dr. Gehringer, a pediatrician, for possible child abuse.

Later that day, at the request of respondents, the Winnebago County Juvenile Court placed Joshua in the temporary custody of the medical center.

On January 25, 1983, a "child protective team" meeting was held at the medical center. The team consisted of medical center personnel, a psychologist, a pediatrician, respondents Ann Kemmeter and Cheryl Stelse -- representing the Department of Social Services -- a representative of the Neenah Police Department, and an assistant corporate counsel for respondent, Winnebago County.

At the January 25, 1983 team meeting, Joshua's condition was discussed in detail and the assistant corporation counsel charged with commencing Court actions in cases of suspected child

abuse, indicated that there was insufficient evidence to retain Joshua in the custody of the Court.

As a result of the investigation and team meeting, respondents filed a report with the State of Wisconsin stating that the report of suspected child abuse was "unfounded". Upon the recommendation of the "child protective team" Joshua was released to his father from the temporary custody of Theda Clark Hospital.

On February 14, 1983 the Winnebago County Juvenile Intake Court closed the child-protection case that had been brought by the respondents and at all times thereafter the involvement of the respondents with the DeShaney family was on a voluntary basis in a "family services" context.

Between February 14, 1983 and March 8, 1984 Kemmeter continued to work with the DeShaney family on a voluntary family services basis; focusing on proper parenting, disciplinary techniques and

in addition observing the children in the family setting when the circumstances permitted.

At no time after the January 25, 1983 team meeting and prior to March 8, 1984 did Kemmeter or Stelse ever feel that there was sufficient evidence or facts pertaining to Joshua DeShaney to take the matter to the assistant corporation counsel for a referral into Court for the removal of the child from the home. Likewise, the assistant corporation counsel, charged with filing a petition under Chapter 48 of the Wisconsin Statutes seeking jurisdiction in cases involving children alleged to be in need of protective services, at no time believed that there were sufficient facts presented to respondents for purposes of pursuing the matter in Juvenile Court.

SUMMARY OF APGUMENT

Petitioners seek to expand the constitution whereby the Fourteenth Amendment would afford individuals the right to basic protective services once a state agency becomes aware of the fact that an individual is exposed to some danger. This proposal runs contrary to well-established principles of constitutional law, conflicts with the decisions of Daniels v. Williams, 474 U.S. 327 (1986) and Davidson v. Cannon, 474 U.S. 344 (1986), and in turn would open the Federal Courts to lawsuits based on Section 1983 even though there has been no affirmative abuse of power and no "special relationship" established.

ARGUMENT

I.

THE DECISIONS OF THE COURTS OF APPEAL ON THIS ISSUE ARE NOT IN CONFLICT AS A RESULT OF THE DECISION IN THE COURT BELOW

Petitioners maintain that a conflict now exists amongst the Federal Courts of Appeal as a result of the Seventh Circuit's Decision. Petitioners argue that Doe v. New York City Dept. of Social Services, 649 F.2d 139 (2d. Cir. 1981); Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3rd Cir. 1985); and Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), Cert. Denied, ____ U.S. ____, 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985) all stand for the proposition that "the aggravated misconduct of public officials in failing to protect a particular child whom they knew to be in serious physical danger . . . does constitute an actionable wrong under 42 U.S.C. 1983". Petition for Writ of Certiorari, at

27-28. In contrast, petitioners claim . . .

> the Court below ruled that even aggravated misconduct (such as it found to exist in this case) could not, as a matter of law, give rise to enforceable rights under Section 1983. In effect it ruled that the only actionable misconduct in such cases would be where the public official physically commits the assault, and that to stand by and allow another to commit the act, despite overwhelming awareness of the impending danger to the child, is of no legal significance. Id. at 28-29.

Petitioners are incorrect in their understanding of the Seventh Circuit's Decision.

A closer reading of DeShaney v. Winnebago County Dept. of Social Services, 812 F.2d 298 (7th Cir. 1987) reflects that the decision is based on well-founded principles of law and is therefore consistent with the law of other circuits.

A basic premise of constitutional law is that before "an omission that leads to a death [or

injury] is actionable under the Fourteenth Amendment and Section 1983, the constitution must recognize an underlying duty on the part of the state [agency] to act". Jackson v. Byrne, 738 F.2d 1443, 1446 (7th Cir. 1984). In other words, a constitutional tort actionable under Section 1983 requires a deprivation of a right, privilege or immunity secured by the constitution or laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535 (1981); Baker v. McCollan, 443 U.S. 137, 146-47 (1979).

As both Judge Posner -- writing for the Seventh Circuit Court of Appeals -- and Judge Reynolds -- writing for the United States District Court for the Eastern District of Wisconsin -- aptly indicate at the onset of their opinions, the Fourteenth Amendment's concept of liberty does not afford individuals the right to basic protective services. This principle represents a traditional conception of the due process clause.

See San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Griffin v. Illinois, 351 U.S. 12 (1956); Walker v. Rowe, 791 F.2d 507 (7th Cir. 1986); Ellsworth v. City of Racine, 774 F.2d 182 (7th Cir. 1985); Beard v. O'Neal, 728 F.2d 894 (7th Cir. 1984); Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983); Estate of Gilmore v. Buckley, 787 F.2d 714 (1st Cir. 1986); Bradberry v. Pinellas County, 789 F.2d 1513 (11th Cir. 1986); Washington v. District of Columbia, 802 F.2d 1478 (D.C. Cir. 1986).

This conception arises from the view that the constitution . . .

> is a charter of negative liberties; it tells the [government] to let people alone; it does not require the Federal Government or the state to provide services, even so elementary a service as maintaining law and order.

Jackson v. Byrne, 738 F.2d at 1446 (quoting Beard v. O'Neal, 728 F.2d at 894).

Consistent with the decisions of Doe, Bailey, and Jensen, DeShaney recognizes an

exception to the above constitutional principle. When a municipality or other governmental entity affirmatively "places the victim in a situation of high risk" it may assume a special relationship with such an individual, from which relationship a duty to provide basic protective services may arise.

> It is true that there is a "special relationship" between a prison and its inmates which imposes on the prison a constitutional duty (although a severely limited one) to protect an inmate from the violence of his fellow inmates. (citation omitted) What is special, however, is that the prison authorities, having placed the inmate in a position of danger, cannot shrug off all responsibility when the danger materializes and injury results.

812 F.2d at 303-04 (Emphasis Added).

If a conflict does exist, it exists between Bailey and the decisions of Daniels v. Williams, 474 U.S. 327 (1986), and Davidson v. Cannon, 474 U.S. 344 (1986).

Bailey sets forth the following factors to

consider in determining whether a "special relationship" exists.

> Whether the victim or perpetrator was in legal custody at the time of or prior to the incident; whether the state had expressly stated its desire to provide affirmative protection to a particular class or specific individual; and whether the state knew of the victim's plight.

768 F.2d at 509.

As Judge Reynolds noted, the adoption of this test would run contrary to the decisions of Davidson and Daniels wherein this Court made it clear that Section 1983 is to be invoked only where there has been some affirmative abuse of governmental power. An adoption of the Bailey test would . . .

> provide claims under Section 1983 to plaintiffs whose injuries have little or nothing to do with the arbitrary use of governmental power for purposes of oppression (citation omitted) claims which recent rulings by the United States Supreme Court appear to preclude . . . (citation omitted)[.]

In particular, the second factor of the Estate of Bailey test -- whether the state has expressly stated its desire to provide affirmative protection to a particular class or specific individuals -- is unsound. This factor would favor Section 1983 liability in a case where state officials acted under color of a law containing an expression of legislative intent to protect one or another of the socially or economically deprived classes of our society. Each such law would give rise to a "special relationship" of constitutional duty to achieve the legislature's intent as soon as a state official took action with respect to a member of the protected class. Every social welfare program would thus become a charter of constitutionally sanctioned social and economic "rights" which, unlike the civil and political rights traditionally protected by Section 1983, require much more than the restraint of governmental power to guarantee.

Decision and Order, (June 20, 1986), at 9-11, (R.65) (Pet. App. at 69-71).

If a conflict exists, it is not between Doe, Jensen, Bailey and DeShaney, but rather between Bailey and the decisions of Davidson and Daniels.

II.

THIS CASE DOES NOT PRESENT THIS COURT WITH THE OPPORTUNITY TO RESOLVE THE QUESTION LEFT OPEN BY DANIELS

Although the question of "whether something less than intentional conduct, such as recklessness or 'gross negligence', is enough to trigger the protection of the due process clause" remains to be answered by this Court, this is not the appropriate case to resolve the question . See Daniels, 106 S.Ct. 662, 667, n. 3.

The Seventh Circuit assumed that both Daniels and Davidson would not be a bar to petitioners' action.

> We may assume without having to decide that the failure of the Winnebago Department of Social Services to protect Joshua from his father was a sufficiently aggravated form of negligence to escape the bar of Daniels . . . and Davidson . . . which hold that simple negligence does not violate Section 1983.

812 F.2d at 302.

Thus, petitioners seek the granting of a Writ of Certiorari based on an issue which was not dispositive in the Lower Court.

Whether the respondents' conduct rose to a level whereby it would escape the bar of Daniels and Davidson is not the focal point of this case. Rather, before this issue can even be addressed, first and foremost the question becomes whether the respondents had a duty to act in the first instance.

Since the true issue is whether there existed an underlying duty, recognized by the constitution, on the part of the respondents to act, this case does not provide this Court with the opportunity to resolve the question left open by Daniels.

III.

GRANTING PETITIONERS' PASSIONED PLEA FOR A RULING IN THEIR FAVOR WOULD IN TURN OPEN THE FEDERAL COURTS TO LAWSUITS WHERE THERE HAS BEEN NO AFFIRMATIVE ABUSE OF POWER

In part three of their argument, petitioners argue that a ruling in their favor "would be of major significance to every child protection agency in the nation". Petition for Writ of Certiorari, at 32. In effect, every agency would definitively know "how assertive they must be in intervening to protect an endangered child". Id. at 33.

Respondents agree that a ruling in petitioners' favor would be of major significance, but of a negative consequence.

The constitution would be expanded. See Daniels, 106 S.Ct. at 665. The Fourteenth Amendments' concept of liberty would in turn afford all individuals the right to basic protective services once any state agency, whether it is a police

department, fire department, or child protection department, became aware of the fact that an individual was exposed to some danger. To adopt petitioners' proposal . . .

> would be more than an extension of traditional conceptions of the due process clause. It would turn the clause on its head. It would change it from a protection against coercion by state government to a command that the state use its taxing power to coerce some of its citizens to provide services to others.

Jackson v. City of Joliet, 715 F.2d at 1204.

> A socially undesireable chilling effect would arise whenever a state would confront the occasion to provide protective services to individuals in need because by doing so states would be buying themselves lawsuits if their efforts failed.

> Moreover, the proposition that by once assuming custody of a child a state becomes obligated by federal law to act with some minimum competence in overseeing the child's welfare would if accepted inject the Federal Courts into an

> area in which they have little knowledge or experience: that of child welfare. Balancing the rights of parents with those of their children is a task as difficult as it is delicate, and we doubt that it will be performed better under the eyes of Federal Courts administering constitutional law than by the State Judicial Administrative authority. . . . To place every state welfare department on the razor's edge, where if it terminates parental rights it is exposed to a Section 1983 suit (as well as a state-lawsuit) by the parent and if it fails to terminate those rights it is exposed to a Section 1983 suit by the child, is unlikely to improve the welfare of American families, and is not grounded in constitutional text or principal.

DeShaney, 812 F.2d at 304.

Contrary to petitioners' sympathetic plea, a decision from this Court would not give child protective agencies constructive guidance in determining when they must intervene in a child abuse situation. Agencies would be placed in a position of either becoming a guarantor of the safety of each child the agency would make con-

tact with or, in the alternative, the agency would be forced simply to refuse to offer voluntary assistance to such families for fear of subjecting itself to charges of constitutional deprivation in violation of Section 1983. Neither the Fourteenth Amendment or Section 1983 were meant to be invoked in such an imaginitive fashion.

Furthermore, a decision from this Court will not give child protection agencies guidance in determining "how far they may go in turning a blind eye to a child's plight". Petition for Writ of Certiorari, at 33. For petitioners and other parties similarily situated are not without recourse since there are ample remedies available in State Courts under common law tort principals.

CONCLUSION

For the foregoing reasons, respondents submit that this Court should deny petitioners' Writ of Certiorari.

Dated this 25th day of August, 1987.

WINNEBAGO COUNTY DEPARTMENT
OF SOCIAL SERVICES, et al.,
Respondents

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ENTRY OF APPEARANCE

TO: Clerk of the United States Supreme Court

NOTICE IS HEREBY GIVEN, pursuant to Supreme Court Rule 28(5)(b), that the undersigned, members of the Bar of the Supreme Court of the United States, will appear as counsel for Winnebago County Department of Social Services, Winnebago County, Ann Kemmeter and Cheryl Stelse, Respondents, in the above-entitled action.

Dated: August 21, 1987.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 25th day of August, 1987, a true and accurate copy of the Respondents' Brief in Opposition to Petition for Writ of Certiorari was deposited in the United States mail, postage prepaid, addressed to:

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